No. 92-1715

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In the Supreme Court of the United States

OCTOBER TERM, 1992

NARCISO S. MARILAO, JR., PETITONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to inspect the district court clerk's jury selection lists.

2. Whether the district court denied petitioner the opportunity to comment on his amended presentence report.

3. Whether the government engaged in misconduct that warranted dismissal of the indictment or a new trial.

4. Whether the district court abused its discretion in admitting evidence under Federal Rule of Evidence 404(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-3A) is unpublished, but the decision is noted at 986 F.2d 1410 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1993. A petition for rehearing was denied on February 23, 1993. Pet. App. 4A-5A. The petition for a writ of certiorari was filed on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy to defraud the Immigration and Naturalization Service (INS), in violation of 18 U.S.C. 371, and on three counts of using fraudulent immigration documents, in violation of 18 U.S.C. 1546(a). He was sentenced to 16 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay a $10,000 fine. The court of appeals affirmed. Pet. App. 1A-3A.

1. In April 1990, Rodolfo Pamposa, a Philippine national illegally present in the United States, consulted petitioner, a New Jersey attorney who practiced immigration law, to determine whether Pamposa was eligible for amnesty. Pamposa told petitioner that he had first arrived in this country in 1984 and that his last entry occurred in 1988. Petitioner advised Pamposa that he would have to change his date of entry to qualify for amnesty. Subsequently, at petitioner's instruction, Pamposa obtained false certifications showing that he had resided and been employed in the United States from 1976 to 1980. Petitioner later prepared an application for amnesty that falsely stated Pamposa's residence and date of entry. Gov't C.A. Br. 8-9.

In early May 1990, petitioner took Pamposa and Salvadore Panahon, another illegal Philippine alien, to the New York INS office to apply for amnesty. Both Pamposa and Panahon were New Jersey residents, but petitioner changed the addresses on their amnesty applications to state that they resided in

New York. INS denied both Pamposa's and Panahon's applications for amnesty. Gov't C.A. Br. 9-10.

On May 21, 1990, petitioner altered Pamposa's and Panahon's amnesty applications to state that they lived in Philadelphia. He then took Pamposa, Panahon, and Elderina Corado, a third illegal Philippine alien, to the Philadelphia INS office to apply for amnesty. On petitioner's advice, Pamposa and Corado falsely told INS officials that they lived in Philadelphia. Gov't C.A. Br. 10-11.

2. In July 1990, INS officials visited Corado and Pamposa. The INS agents told Corado and Pamposa that their amnesty applications had been found to be fraudulent and that if they were willing to make complete and truthful statements, they would be prosecuted for misdemeanors instead of felonies. After being informed of their *Miranda* rights, both Corado and Pamposa executed written waivers of those rights and then gave statements recounting that petitioner counseled and aided them in including false information in their amnesty applications. At the request of INS officials, Pamposa and Corado also recorded telephone conversations with petitioner. Gov't C.A. Br. 11-12, 20-23.

3. Petitioner was subsequently indicted and convicted for defrauding the INS and for using fraudulent immigration documents. On appeal, petitioner challenged the district court's denial of his pretrial motion to inspect the district court clerk's records regarding the selection of the grand and petit juries in his case, Pet. App. 6A-7A, 16A-22A, 23A-24A; Gov't C.A. Br. 13-16; the district court's admission of testimony of two other illegal Philippine aliens that petitioner had assisted in making fraudulent amnesty

applications, Gov't C.A. Br. 38-39; and the district court's denial of petitioner's request for dismissal or a new trial based on the government's misconduct, Gov't C.A. Br. 19-31. The court of appeals summarily affirmed. Pet. App. 1A-3A.

ARGUMENT

1. Petitioner contends (Pet. 9-13) that the district court erred in denying his motion to inspect jury selection records for the Eastern District of Pennsylvania. That contention is without merit.

The Jury Selection and Service Act of 1968, 28 U.S.C. 1861-1878, requires the random selection of potential jurors from voter registration lists or lists of actual voters, as supplemented by other sources if necessary to foster the Act's policy of ensuring selection of juries from a fair cross-section of the community. See 28 U.S.C. 1861, 1863. The Act sets forth detailed procedures that each judicial district must follow to guarantee that grand and petit juries are chosen in a nondiscriminatory fashion. See 28 U.S.C. 1862-1864, 1866.

Under the Act, a criminal defendant may move to dismiss an indictment or stay the proceedings against him "on the ground of substantial failure to comply with the provisions [of the Act] in selecting the grand or petit jury." 28 U.S.C. 1867(a). The Act gives a criminal defendant who makes or intends to make such a motion the right to obtain inspection of the records compiled by the clerk of the court in the jury selection process. 28 U.S.C. 1867(a) and (f). In *Test* v. *United States*, 420 U.S. 28 (1975) (per curiam), this Court held that litigants have "essentially an unqualified right to inspect jury lists" in order to

support a motion "challenging jury-selection procedures." *Id.* at 30 (emphasis omitted).

Petitioner moved to inspect the jury selection records for the Eastern District of Pennsylvania. He made that motion in support of his challenge to the district court clerk's use of voter registration lists to select potential jurors. That system of selection, he argued, resulted in the underrepresentation of certain minorities, in violation of the Constitution. He did not allege, however, that the clerk had failed to comply with the requirements of the Act. Accordingly, his motion represented a facial challenge to the Act's preference for using voter registration rolls as a pool for jury venires, and not an attack on the particular jury selection procedures used to select the grand jury that indicted him. Thus, his motion did not fall within the provision of the Act allowing access to jury selection records, he was not entitled to obtain inspection of the records he sought, and this Court's decision in *Test* is inapposite.

Petitioner's underlying challenge to the use of voter registration records as the source of jury venires is without merit. The Third Circuit has long held that such use of voter registration lists is constitutionally permissible. See *United States* v. *Lewis*, 472 F.2d 252, 256 (3d Cir. 1973); see also *United States* v. *Frumento*, 409 F. Supp. 136, 141 (E.D. Pa. 1976), aff'd, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 439 U.S. 1072 (1978) (challenge under Act and Fifth Amendment); *United States* v. *Long*, 88 F.R.D. 701, 705 (W.D. Pa. 1981), aff'd, 676 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 829 (1982); *Savage* v. *United States*, 547 F.2d 212, 214-215 (3d Cir. 1976) (petit jury). Every court of appeals to have addressed the issue has

upheld the Act's preference for the use of voter registration lists against a Sixth Amendment challenge. See *United States* v. *Cecil*, 836 F.2d 1431, 1451 (4th Cir.) (en banc), cert. denied, 487 U.S. 1205 (1988); *United States* v. *Afflerbach*, 754 F.2d 866, 869-870 (10th Cir.), cert. denied, 472 U.S. 1029 (1985); *United States* v. *Pepe*, 747 F.2d 632, 648-649 (11th Cir. 1984); *United States* v. *Hafen*, 726 F.2d 21, 22-24 (1st Cir.), cert. denied, 466 U.S. 962 (1984); *United States* v. *Hawkins*, 661 F.2d 436, 442 (5th Cir. 1981), cert. denied, 456 U.S. 991 (1982); *United States* v. *Warinner*, 607 F.2d 210, 214 (8th Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Brady*, 579 F.2d 1121, 1134 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). The grand jury records that petitioner sought could not have buttressed that legal challenge; the court of appeals was therefore correct in denying petitioner relief.

2. Petitioner next contends (Pet. 14-17) that the district court denied him an opportunity to comment on the revised presentence report at his sentencing hearing. Petitioner raised that claim for the first time in his petition for rehearing; this Court should accordingly decline to review it. See *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); cf. *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1531 (1992). In any event, petitioner's contention is meritless.

Petitioner and his attorney each filed objections to the presentence report. In response to those objections, the probation office produced an amended report. At sentencing the district court specifically noted that petitioner was dissatisfied with the amended report. Accordingly, the district court allowed petitioner's counsel to argue at length re-

garding petitioner's objections to the revised report. The district court also did not prevent petitioner himself from commenting on the report. Instead, the court told petitioner that his attorney had adequately addressed the legal issues surrounding his sentencing and that petitioner would be better off making a personal statement. When petitioner disregarded that advice, the district court did not make any effort to preclude petitioner from addressing the presentence report, nor did it limit petitioner's comments to the court. 4/24/92 videotape 9:12-9:13, 11:06-11:10.* Petitioner's sentencing fully complied with the requirements of Federal Rule of Criminal Procedure 32.

3. Petitioner also errs in arguing (Pet. 18-28) that the government engaged in outrageous conduct that should have led the district court to dismiss the indictment or grant a new trial.

a. Petitioner claims (Pet. 18-21) that the INS agents' contact with Corado and Pamposa after their visit to the Philadelphia INS office violated Rule 4.2 of the Model Rules of Professional Conduct (1984), which provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

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* Pursuant to 28 U.S.C. 753, the Judicial Conference of the United States has authorized the Eastern District of Pennsylvania, on an experimental basis, to use videotape recording for making the official record of court proceedings. See Standing Order for Videotape Recording of Court Proceedings, E.D. Pa. R. 15 foll.

That rule has no application to this case. First, the rule does not prohibit preindictment, investigative contacts by law enforcement officers with persons represented by counsel. See *United States* v. *Ryans*, 903 F.2d 731, 735-739 (10th Cir.), cert. denied, 498 U.S. 855 (1990); *United States* v. *Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States* v. *Dobbs*, 711 F.2d 84, 86 (8th Cir. 1983); *United States* v. *Kenny*, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Second, this is not a case in which the agents of the government contacted a suspect in the absence of his counsel; in this case, the lawyer was the suspect. The agents' contacts with the clients did not in any way affect petitioner's right to counsel as would be his claim if petitioner had been the client-suspect who was contacted in the absence of his lawyer. Third, even if petitioner could establish that the INS agents' contact with Corado and Pamposa violated Rule 4.2, he would not be entitled to the relief he seeks. Absent a violation of a statute, rule, or constitutional provision designed to control the conduct of government agents, a court may not exercise its supervisory powers to dismiss an indictment or grant a new trial simply because the court concluded that an investigative agent's conduct was improper or unethical. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-256 (1988); *United States* v. *Hasting*, 461 U.S. 499, 505 (1983); *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980); cf. *United States* v. *Williams*, 112 S. Ct. 1735, 1741-1742 (1992).

b. Petitioner further asserts (Pet. 22) that the government should have informed the grand jury of the "lenient charges and sentences and Employment Authorization Cards given to government star

witnesses Corado and Pamposa." In fact, the government informed the grand jury that Corado and Pamposa were going to plead guilty to misdemeanors. The other aspects of their plea agreements had not been resolved when they testified before the grand jury. Gov't C.A. Br. 29. Furthermore, this Court recently has made clear that the government has no duty to present to the grand jury all evidence bearing on the credibility of a witness. See *Williams*, 112 S. Ct. at 1742.

c. There is likewise no merit to petitioner's claim (Pet. 22) that the presence of a second prosecutor in the grand jury room violated Federal Rule of Criminal Procedure 6(d). Rule 6(d) provides that "[a]ttorneys for the government * * * may be present while the grand jury is in session," and Federal Rule of Criminal Procedure 54 defines "[a]ttorneys for the government" to include "an authorized assistant of a United States Attorney." There is no prohibition against several prosecutors being present at one time. In any event, petitioner has now been convicted by a jury. Therefore, even if there had been a violation of Rule 6(d), the subsequent jury verdict would render that error harmless. See *United States* v. *Mechanik*, 475 U.S. 66, 72-73 (1986).

d. Finally, petitioner alleges (Pet. 25-28) that the prosecutor engaged in several acts of trial misconduct that were sufficiently outrageous to warrant relief. As to the claim that the prosecutor spoke with a witness at a recess during her cross-examination, the government pointed out in its brief on appeal that the only recess during her testimony occurred during direct examination, not cross-examination. Gov't C.A. Br. 31. Petitioner's objection to the reference to

the high fees he charged Pamposa and Corado is not well taken. The size of the fees that petitioner charged provided some indication that petitioner knew the course he was pursuing on behalf of his clients was unlawful. With respect to petitioner's complaint about the prosecutor's alleged "vouching" for his witnesses, it was entirely appropriate for the prosecutor to elicit the terms of the witnesses' cooperation agreements in anticipation of cross-examination. See *United States* v. *Oxman*, 740 F.2d 1298, 1302-1303 (3d Cir. 1984); *United States* v. *McNeill*, 728 F.2d 5, 14 (1st Cir. 1984); *United States* v. *Rohrer*, 708 F.2d 429, 433 (9th Cir. 1983). And the prosecutor's closing argument, in which he contended that the prosecution's witnesses were credible and petitioner's were not, was entirely proper. Petitioner's claims of trial error are thus without merit and in any event fall far short of the sort of outrageous conduct that could be deemed to violate the Due Process Clause. See *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973).

4. Petitioner's final claim (Pet. 29-31) is that the district court abused its discretion by admitting under Federal Rule of Evidence 404(b) testimony from two other illegal aliens that petitioner had instructed them to prepare fraudulent immigration documentation. That fact-bound claim is wholly without merit.

Rule 404(b) allows the admission of evidence of "other crimes, wrongs, or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Huddleston* v. *United States*, 485 U.S. 681 (1988). In this case, the government introduced evidence that petitioner engaged in acts with other illegal aliens

that were strikingly similar to and occurred almost simultaneously with the offenses charged in the indictment. That evidence tended to show that petitioner acted with criminal intent and that the witnesses did not simply misconstrue his legal advice to them. Moreover, the district court lessened the risk of any unfair prejudice to petitioner by giving the jury a limiting instruction regarding that evidence. Accordingly, petitioner's claim does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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